

PUBLIC CONTRACTS REVIEW BOARD

Case 2129 – T027/24 – Tender for the Provision of a Policy Management and Governance, Risk and Compliance Platform

9th July 2025

The Board,

Having noted the letter of objection filed Dr Clement Mifsud Bonnici, Dr Calvin Calleja and Dr Krista Refalo on behalf of Ganado Advocates acting for and on behalf of CY4 Limited, (hereinafter referred to as the appellant) filed on the 26th May 2025;

Having also noted the letter of reply filed by Dr Karina Di Maggio acting for the Malta Information Technology Agency (hereinafter referred to as the Contracting Authority) filed on the 3rd June 2025;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 3rd July 2025 hereunder-reproduced.

Minutes

Case 2129

T027-24 – Tender for Provision of a Policy Management and Governance, Risk and Compliance Platform

The tender was issued on the 14th August 2024, and the closing date was the 25th September 2024.

The estimated value of the tender, excluding VAT, was €500,000.00.00

The recommended Contract Value (Excluding VAT) was €392,850.00.00

On 26th May 2025 CY4 Limited (C104424) (TID 215964) lodged an appeal against Malta Information Technology Agency (MITA) – the Contracting Authority, in terms of Regulation 270 of the Public Procurement Regulations (Subsidiary legislation 601.3) (the “PPR”) in connection with the above-captioned Tender.

The appellant’s bid was disqualified as although technically compliant CY4 Ltd submitted an incorrect document.

A deposit of €2,500.00 was paid.

There were twelve (12) bids.

On the 3rd July 2025, the Public Contracts Review Board (PCRB), composed of Mr Kenneth Swain as Chairperson, Dr Ana Thomas and Dr Vincent Micallef, as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant: CY4 Ltd

| | |
|---------------------------|------------------------|
| Dr Clement Mifsud Bonnici | Legal Representative |
| Dr Calvin Galea | Legal Representative |
| Dr Kelly Cini | Legal Representative |
| Mr Keith Cutajar | Company Representative |
| Ms Rosanne Brooks | Company representative |

Contracting Authority: Malta Information Technology Agency (MITA)

| | |
|-----------------------|-----------------------------|
| Dr Karina Di Maggio | Legal Representative |
| Dr Michaela Mifsud | Legal representative |
| Mr Richard Schembri | Manager Contracts and Legal |
| Ms Rosalynn Muscat | Chairperson |
| Mr Kurt Attard | Evaluation Committee |
| Ms Sharon Gauci | Evaluation Committee |
| Mr Christopher Xuereb | Evaluation Committee |

Minutes

The Chairperson Mr Kenneth Swain welcomed the parties, declared the hearing of Case 2129 open, and invited the representatives of CY4 Limited to open the initial submissions.

Dr Clement Mifsud Bonnici declared that since no witnesses were summoned, he suggested that the parties could start immediately with their submissions.

Dr Karina Di Maggio agreed.

Dr Mifsud Bonnici introduced Dr Kelly Cini representing CY4 to submit her submissions.

Dr Kelly Cini stated that MITA's decisions were not valid and MITA fell short of its obligations to the detriment of the appellant thus giving rise to three grievances being:

First Grievance:

The submitted document by CY4 completely conformed with the Tender Document and was disqualified by the Contracting Authority on external considerations which are not included in the Tender Document, thus infringing the principle of Self Limitation.

Second Grievance:

Even if this document was an incorrect one (and the appellant disagrees), the Contracting Authority had the obligation to send a rectification request thus giving the opportunity to the appellant to submit the document again.

Third Grievance:

The disqualification was disproportionate and goes against Article 39 of the Public Procurement Regulations.

Addressing the first grievance Dr Cini explained that the appellant was obliged to submit a Licence Terms for the Solution Proposed in the Tender Response Format. She contended that CY4 conformed to this requirement by submitting a document showing that it was licenced to provide a service which is non-transferable and non-exclusive to market, sell, promote and offer from the Centraleyes Platform. In spite of this the adjudicating board decided that this document was not satisfactory and the appellant was disqualified.

Dr Cini insisted that there are no requirements in the Tender Document which explain what this document has to include so much so, that the reference to "Licence" is not even mentioned in the Tender Document. In fact, Dr Cini said that this can only be found in the Tender Response Format under the section Eligibility and Selection Criteria and a fleeting reference as a title of Schedule of document B which is in the Potential Contract.

Dr Cini reiterated that while the contracting Authority insisted that there were elements which were not included in our document like intellectual property rights, warranties etc., we still do not know of a valid reason for the exclusion.

Dr Cini insisted that the fact that the C.A. insisted that including these elements in the document is Standard Market Practice is in itself an admission that the C.A. itself has gone against the principle of self-limitation. This can she contended can be confirmed by the decision of the PCRB in case 2016 where when one of the witnesses stated that a warranted document was General Practice the PCRB stated that this clearly demonstrated that the T.E.C. applied unwritten standard practices rather than adhering to the Tender requirements; thus, violating the principles of self-limitation. Dr Cini insisted that this is what exactly happened in the present tender.

Dr Cini also referred to PPR article 39.2 where it is stated that if a Contracting authority asks for a requirement this has to be included in the Tender Document. In this case Dr Cini stressed the fact that the Tender warranted a Licence Terms and the problem is that the T.E.C. applied elements which it itself decided to follow when these are found nowhere.

Dr Cini also referred to another PCRB case 2090 where again the board reiterated that although the C.A.'s expectation was reasonable, it was not adequately transposed in the Tender Document and given this absence the appellant should not be penalized for failing to submit documentation which was not explicitly requested in the Tender Document. And this, Dr Cini remarked, is what happened in the present case as well.

Dr Cini explained that in the first place the argument put forward by the C.A. that the information warranted was needed so that the solution complies with the requirement is not valid. This is because the Licence terms were not asked for as part of the technical offer but were warranted under the Selection and Eligibility Criteria in the Tender Response Format.

Dr Cini said that it is difficult to understand how the C.A. is trying to check the technical compliance of the offer according to a document which is not part of the technical offer.

Secondly Dr Cini explained that the Draft Contract Document B makes it clear that the conformity of these Licence terms with the Contract is a Performance Condition. Quoting from Article 8.6 of the Contract: **“In the event that a contractor.....is in line with this contract;”** Dr Cini emphasized that after the award is given, it is the contractor and not the Contracting Authority at submission stage to consider if the Licence terms submitted align with the contract.

Dr Cini also referred to PCRB Case 2125 where it was stated that Performance Conditions cannot be satisfied at submission stage.

Addressing the second grievance Dr Cini stated that even if the PCRB considers that the document provided did not conform to the Licence Terms the C. A. had the obligation to ask Cy4 for a rectification if the document was not the one it needed because this is only mentioned under the Selection Eligibility Criteria in the Tender Response Format. It is nowhere mentioned in the Tender Document and the argument that this is a Note 3 issue is not valid for these fall under Note 2. Dr Cini contended that once the C.A. failed to do this obligation and instead excluded the appellant without any form of communication, this led to the 3rd Grievance.

Addressing the 3rd grievance Dr Cini stated that the appellant’s exclusion was a strictly harsh and disproportionate choice. Dr Cini explained that the principle of proportionality requires that the C.A.s decision reaches the aim of the tender and that it does not go beyond the parameters of the tender requirement to reach that aim. In this case the aim was to choose the most advantageous economic bid but at the same time to safeguard the other bidders’ rights so that the process is fair and competitive.

At this stage Dr Cini referred to Court of Appeal case 237/2021/1 AIB Insurance Brokers vs Transport Authority where the missing document was a Note 3 issue and where the Court stated that after bids are opened a bidder cannot give new information after he has knowledge of details of the other bidders and hence he gaining unlawful advantage. It continued that since the document in question did not change anything in the offer itself the decision in favour of the winning bidder was revoked.

Going through the requirements of this appeal Dr Cini asked a number of r questions:

If the appellant was asked to submit a new document, was it going to effect the technical offer that they submitted before? And the answer is a No.

Was the platform the same?

Are the conditions upon which it was offered the same?

The technical requirements of the offer are the same?

Was it going to rectify an offer which was not conforming when the bids were submitted? And the answer is a No

Dr Cini stated that the C.A. said that what it wanted (although this is not mentioned in the tender document), was how the relationship with the end user was regularized. Dr Cini continued that the fact that the licence exists in order for this platform to be offered to the C.A. is implicit answer that there is a user licence agreement which existed before the submission of the tender.

Dr Cini stated that the appellant was not going to have an advantage over other bidders as this was not a technical requirement, nor part of the technical offer, was not included in the BPQR, was not going to be given different marks and in fact there were no advantages involved if CY4 were given the chance to submit this document.

To sum up as regards the principle of proportionality Dr Cini said that the decision by the C.A. not to allow for the submission of the document was absurd. Quoting the Contract Document B in article 2 Dr Cini said that this specified that any provision in 3rd party licence terms that goes against the contract are superceded by the contract itself. The bidder's offer which was the cheapest bid although being a BPQR tender with the price element being 60%, was disqualified because a submitted document information which was not even requested would have still been superceded by the contract itself. Hence she continued this decision cannot be considered to be one of honoring the principle of proportionality.

Finally, Dr Cini reiterated that the decision of the C.A. in disqualifying this bid through external elements, not asking for a rectification and not acting proportionally reached no aim except to cost the authority 93.000 more euro.

Submission by Dr Karina Di Maggio

Addressing the first grievance Dr Di Maggio stated that MITA asked for Licence Terms for the Solution Proposed and it did not ask for a licence between a tenderer and a manufacturer and that which was provided by CY4 Ltd was a partner services agreement, and that is not a licence terms.

She explained that Licence Terms as an industry standard is that which includes the licences that one buys and which are subject to a relationship between the buyer and those who are providing the service. This licence terms she emphasized includes such aspects as:

- a. How can one regularize this relationship.
- b. How can I use it.
- c. Are there any restrictions for its use?
- d. What are the rights involved?
- e. What can I do so that it is not terminated.
- f. Is this a subscription or perpetual?

Dr Di Maggio continued that the Mandatory Requirements Document mandated that the licence provided had to be subscription based and the Contracting Authority required these licences terms to confirm the mandatory requirements. However, she reiterated that the adjudication committee couldn't confirm these requirements as these were not found in the document presented by the appellant.

Dr Di Maggio continued that the difference between them is that the Partnership Services Agreement is only governing the relationship between the software owner and the tenderer.

She contended that although this is fine it does not apply for the particular requirement of the tender and when the adjudicating committee asked for a rectification the appellant handed in the same document.

Dr Di Maggio explained that all in all MITA was going to buy one item i.e. a licence and it wanted to confirm through a licence term and this is industry standard practice.

Dr Di Maggio stated that MITA is asking for professionals in this field and these do not need explanations when this is industry standard.

Addressing the second Grievance Dr Di Maggio referring to Note 2 and Note 3 explained that the tender was a BPQR. The requirements are inputted in the ePPs where one finds the eligibility, technical and financial a certain amount of weighting is given once the envelope is opened. She said that the fact that one has to include both there is bound to be some distortion how to give the weighting. She continued that the Mandatory requirements had no weighting because it is either a yes or a no and these determine if you pass or not.

She continued that both the Tender Document and the ePPs have to be read together and they both reflect each other. In the letter of reply, the C.A. sent screen shots of both the ePPs and the tender document, specifying which are the eligibilities, which are all Note 2 and the technical which falls under Note 3. She continued that under the title of specifications, there are the mandatory requirements which falls under Note 3, the tenderer's written response to the qualitative technical requirements which are also Note 3 and the tenderer's technical offer in response to specifications to be submitted online through the prescribed tenderer's response format which are also note 3.

Dr Di Maggio explained that when one goes to the ePPs under eligibility, one finds the eligibility requirements which are all Note 2 and the titles of specifications which has 2 sections, one for the Mandatory requirements and the other where to attach the licence terms to the solution provided.

Dr Di Maggio explained that during the adjudication the board retrieved a document submitted by CY4 and referring to Centraleyes who was not submitted as a subcontractor. Hence the board wanted to examine the relationship between them and after asking for a clarification under Note 2 the appellant handed in the Partnership Licence Agreement document that is, the same as the one that was submitted before and instead of the Licence agreement which we actually wanted. This document showed that Centraleyes was agreeing to give a non-transferable non-exclusive licence to market, self-promote and offer. This made the appellant administratively compliant,

Dr Di Maggio continued that the adjudication moved to the mandatory licence terms conditions and the evaluation committee tried in vain to find if there were any submitted by the appellant. There were none, and as the required document was under Note 3, we had to follow the principle of self-limitation and so no call for rectification was possible.

At this point Dr DiMaggio quoted from Case 1780 of the PCRB where the bid was declared technically non-compliant and a clarification would not have solved the issue. If this was done the adjudicating committee would have gone against the principle of self-limitation and would have shattered all level playing fields

Dr Di Maggio ended her submission by also cited from Court of Appeal Case on the 31st May 2019 Malta Industrial Parks Ltd vs Rockcut Ltd whose decision stated that bidders have to comply with the Tender Requirements and the Contracting Authority has to comply with the requirements that she herself establishes.

Intervention by Dr Mifsud Bonnici

Dr Mifsud Bonnici made reference to Court Case No 1780 which he as the legal advisor of the appellant had lost and where the required technical specifications although submitted elsewhere, i.e. not submitted in the appropriate boxes of the technical response format. He emphasized that one cannot expect the adjudicating committee to fill in the technical offer form itself when this is what is required for the bidder to do. He stated that in this case it is not a case of misplacing offers in different places but it is one where going through all the tender document no such tender requirement is found.

Dr Cini's final submission

Answering to a point made by Dr Di Maggio as regards that licence terms were essential to see that all mandatory requirements were adhered to, Dr Cini stated that this is not an issue as the Tender Response Format shows that the bidders were asked to confirm that all requirements were met.

Dr Cini continued that she agreed with certain points raised by Dr Di Maggio but if these were included in the Tender Document both in the requirements of the Licence Terms, and also why that requirement was included under eligibility and selection, and not under the technical offer.

Dr Cini emphasized that nothing of this was explained to the bidders, and rightly so bidders are not expected to try and understand why it was presented here or why the system does not let you include it there. She explained that if the intention was that this Licence Terms is included as a technical offer, there should have been an explanation in the Tender Document itself.

Dr Cini also remarked that in spite of Dr Di Maggio's statement that the Licence Terms were under Note 3, these were never mentioned in the Tender Document and most probably Dr Di Maggio was referring to Point 3 which states that Tenders Technical offer in response to specifications which are Note 3.

Dr Cini concluded that this is not part of the technical offer and this is nowhere mentioned that it is part of the technical offer.

Dr Di Maggio's final comment.

Dr Di Maggio stated that the Tender Document and the ePPs form the whole Tender Document and the Licence Terms ultimately will be part of the contract. She continued that there is an Appendix in the contract where the Licence Terms are included and these will apply for the terms of the contract because they govern the licence that MITA is actually buying. So, she concluded the Licence Terms are vital and are so fundamental that they will be included in the contract.

At this point the Chairperson thanked the parties and declared the session closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 3rd July 2025.

Having noted the objection filed by CY4 Limited (hereinafter referred to as the Appellant) on 26th May 2025, refers to the claims made by the same Appellant with regard to the tender of reference T027/24 listed as case No. 2129 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici, Dr Calvin Calleja
& Dr Kelly Cini

Appearing for the Contracting Authority: Dr Karina Di Maggio

Whereby, the Appellant contends that:

- a) ***First ground of appeal: The appellant satisfied the tender conditions in full and was technically compliant with all the requirements set out therein.***

The Appellant is respectfully perplexed that the Contracting Authority deemed that the Partner Services Agreement submitted as part of the Appellant's bid does not satisfy the eligibility criterion set out in Section 3.2.2 of the Tender Response Format, as such criterion simply requires one to submit "*a copy of the licence terms for the Solution being proposed*", which document was indeed submitted by the Appellant. It is submitted that if the Contracting Authority required a specific type of licence to be submitted, or if it required that the document submitted contains certain specific information, this should have been made clear in the Tender documentation. The Appellant's bid cannot be disqualified simply because it did not satisfy the expectations of the Contracting Authority, when such expectations were never explained in the Tender documentation. In fact, even from the explanation provided in the Rejection Letter, it is still not clear why the Tender Evaluation Committee determined that the Centraleyes Licence did not satisfy the requirement set out in Section 3.2.2. The Partner Services Agreement submitted by the Appellant, is an agreement with Centraleyes, the owners of the platform proposed by the Appellant, through which the Appellant is licenced and is provided with legal authority to market, sell, promote and offer the Centraleyes Platform and associated services to CY4's customers. Therefore, such document amply satisfies the requirements set out in Section 3.2.2 of the Tender Response Format. The Partner Services Agreement was the appropriate document to be submitted to provide comfort to the Contracting Authority that the provision of the proposed solution would not infringe upon or violate any patent, copyright, trade secret, or any right of third parties, nor would it be libellous or otherwise unlawful, and that the Appellant is appropriately licensed and authorised to provide the Solution in question, thus supporting the warranties and representation set out in Article 6 of Document B - Contract.

- b) ***Second ground of appeal – The contracting authority should have issued a rectification request if it deemed the document submitted by the appellant to be incorrect.***

Without prejudice to the above, if the Tender Evaluation Committee deemed that the Centraleyes Licence submitted by the Appellant was not the correct document, or that it was not the document which it was looking for, it could have easily requested a rectification from the Appellant. In terms of Section 5 of the Tender Document (page 4) the Eligibility Criteria and Selection Criteria sections in the Tender Response Format are denoted as Note 2 matters. This is in line with Procurement Policy Note #40 which stipulates that Eligibility Criteria and Selection Criteria are both generally subject to Note 2. As explained above, the requirement to submit "*a copy of the licence terms for the Solution being proposed*" was included in the Tender Response Format under the heading

"Eligibility/Selection". Accordingly, being a Note 2 issue which involves an allegedly "*incorrect document*" being submitted, a request for rectification was allowed according to Note 2 to Clause 5 which clearly states that: "*Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.*" It is further submitted that in those cases where the Contracting Authority intended to exclude the possibility of rectification with regards specific requirements included under the "Eligibility/Selection" heading in the Tender Response Format on ePPS, it did so by denoting such matters as Note 3 in the Tender Document. No such exception was included in the Tender Document with regards the requirement to submit the licence terms, thus indicating clearly the Contracting Authority's intention for such a requirement to be a Note 2 matter, thus allowing for rectification.

c) ***Third ground of appeal: The decision of the TEC to disqualify the appellant is disproportionate.***

It is submitted that by not seeking a rectification, the Tender Evaluation Committee acted in breach of its obligations to treat the Appellant proportionately in terms of Regulations 39 of the PPR. The disproportionate nature of the Tender Evaluation Committee's decision not to request a rectification is evident when one considers that had it done so, this would not have resulted in an undue competitive advantage being given to the Appellant over other bidders. The Appellant would simply have been given an opportunity to provide documentation which was already existent at the time of the submission of the bid. Such documentation would not have changed the solution offered by the Appellant but rather supplemented the Partner Services Agreement already provided. In this regard, reference is made to the ample jurisprudence of the Maltese Courts on this matter, including *Cassar Petroleum Services Limited vs Gozo Channel et* (Civil Appeal 362/2014) where the Court held that where the rectification and resubmission of a document does not change the terms of the offer itself, allowing a bidder to submit a document which had been excluded from the bid by mistake does not breach the principles of equal treatment, non-discrimination and transparency. On the otherhand, if an advantageous offer is excluded, simply because a document was excluded by mistake, this would be in breach of the overarching principle of proportionality.¹ Similar considerations were made by the Court of Appeal in *Ballut Blocks Services Limited vs Ministru ghar-Rizorsi u I-Affarijiet Rurali et* (Civil Appeal Nr. 440/2012/1).

1. Had the Tender Evaluation Committee sent a rectification request to the Appellant, explaining what kind of documentation it was expecting, the Appellant could have easily produced such documentation, which was already readily available and accessible to the Appellant, and its bid, which was wholly technically compliant, as well as being the cheapest bid submitted, would not have been unnecessarily disqualified.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 3rd June 2025 and its verbal submission during the hearing held on 3rd July 2025, in that:

a) ***First Ground of Appeal -***

The Appellant contends that they satisfied the Tender conditions in full and was technically compliant with all the requirements set out therein, moreover claiming that MITA couldn't disqualify CY4 Ltd's offer "*simply because it did not satisfy the expectations of the Contracting Authority, when such expectations were never explained in the Tender documentation*", and notwithstanding this claim, that the "*document was indeed submitted by the Appellant*". MITA categorically refutes this claim. The Partner Services Agreement submitted as a response to Requirement 2 of the Specifications section in the tender structure within the ePPS, defines the business relationship between CY4 Ltd and Centraleyes, so much so, that CY4 Ltd submitted it once more in response to MITA's rectification request regarding the relationship between the two parties. What the Appellant had to submit were the Licence terms, which, on the other hand refer to the conditions under which one party, the licensor, allows another, the licensee, to use its product. As an industry standard, the key elements making up licence terms should include intellectual property rights, conditions and restrictions for use and distribution, warranties, limitation of liability, term and termination, as well as the type of licence, i.e. whether perpetual or subscription. These terms are necessary for the Contracting Authority to determine the solution it will be procuring, and that it complies with requirements. In fact, the Mandatory Requirements Document mandated that the licence provided had to be subscription based. MITA respectfully disagrees that further explanation as to the definition of licence terms was required however, nothing precluded the Appellant to request clarification on anything contained in the tender during the publication phase of the procurement process. In fact, MITA notes that although it received and responded to a number of clarification requests made by various interested economic operators during the publication stage, no such clarification requests were made by the Appellant.

b) ***Second Ground of Appeal -***

The Appellant is contending that the Contracting Authority was obliged to request a rectification to submit the correct document. The evaluation process undertaken by the Evaluation Committee, as set out in the Tender Document, and in accordance with Clause 16 of the General Rules Governing Tenders, was to first evaluate the eligibility/selection criteria of all the bids received. Given that the eligibility/selection criteria is listed as Note 2, a number of clarifications/rectifications were issued, including to the Appellant, whereby the Evaluation Committee requested rectification of the Certificates of Satisfactory Execution and Outcome to be able to confirm: a) the required experience, and b) the relationship between CY Ltd as the tenderer and Centraleyes. In response to the above, the Appellant submitted responses to the rectifications requested, which included a Partner Services Agreement between CY Ltd and Centraleyes. The Evaluation Committee noted that this same document had been included in the Appellant's original

offer in response to requirement 2 under the Specifications heading of the tender structure within the ePPS, namely, *"Kindly submit a copy of the licence terms for the Solution being proposed."* On the basis of the response to the rectification request, the voting members of the Evaluation Committee decided that *"CY4 Ltd's offer was administratively compliant and should be considered further."* The evaluation committee proceeded to evaluate the technical compliance, starting with the Mandatory Requirements. Given that the BPOR criteria require the awarding of marks, the Specifications that were not included in the BPQR, namely, the agreement to the Mandatory Requirements and the licence terms for the solution being proposed, which require only either a 100 (pass) or 0 (fail), were included under the Eligibility/Selection section. The Specifications, which were denoted in the Tender Document as being subject to Note 3, i.e. *"No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification"*. were included under the Eligibility/Selection section in the tender structure of the ePPS, in In response to requirement 2 under the Specifications heading of the tender structure within the ePPS *"Kindly submit a copy of the licence terms for the Solution being proposed"*, the Appellant submitted the Partner Services Agreement they have with Centraleyes. Based on the advice given by the legal advisor that the document provided is not licence terms in relation to the solution being proposed and no rectification is permitted in view that this requirement is subject to Note 3, the Appellant's offer could not be considered any further and was disqualified. Notwithstanding the Appellant's contention, the Evaluation Committee is bound by the principle of self-limitation. The requirement is clearly defined under the Specifications section of the tender structure in the ePPS (refer to Extract from the Tender Structure, below), and concurrently, "Specifications" are defined in the Tender Document as being subject to Note 3 (refer to Extract from the Tender Document, below (C) (i) Additionally, departing from the conditions which the Contracting Authority defined in the Tender Document undermines the principle of equal treatment in respect to tenderers having direct and indirect interest in participating in submitting their offer.

c) ***Third Ground of Appeal -***

With respect to the Appellant's claim that the Evaluation Committee's decision to disqualify the Appellant was disproportionate, it is pertinent to reiterate the point made above, ie. that the Evaluation Committee proceeded in terms of the principle of self-limitation: the requirement in question is subject to Note 3, and it is abundantly clear that a Note 3 requirement is not rectifiable. Conceding to such request would have rendered the Evaluation Committee as acting ultra vires. In this regard, reference is being made to considerations made in *NOUAYMT Konsorzju compost minn Bonnici Bros. Services Ltd et vs Agenzija Ghal Infrastruttura Malta et* where it was held that: *"L-eccess fil-manjamina u fit-tfittix sabiex jigu salvati offerti akkost ta' kollox mhux espressioni ta' proporzjonalita imma huwa sproportzjon kontra min kien "compliant" mill-bidu nett. Din il-Qorti mhux l-ewwet darba li tiribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorozjament dak li trid is-*

sejba għall-offerti u m'għandux jiġpretendi li jiġi mitlub "jirringa" l-offerta biex ikun kompatibbli ma' dak mitlub."

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

a) ***First Ground of Appeal: Alleged Technical Compliance with Tender Requirements***

The Appellant contends that it fully satisfied the tender conditions and submitted a document, the 'Partner Services Agreement', which it believes satisfies the requirement to submit "*a copy of the licence terms for the Solution being proposed*" as stated in Section 3.2.2 of the Tender Response Format. The Appellant submits that if the Contracting Authority required a specific type of document or particular content within such document, this should have been expressly stated in the tender documentation. In the absence of such clarification, the Appellant argues that disqualification on this ground is unjustified.

The Board concurs with the Appellant's position. It is the view of this Board that the wording of the requirement in Section 3.2.2 lacks sufficient specificity and does not clearly distinguish between licence terms and other forms of documentation evidencing authorisation to distribute and implement the proposed solution. The 'Partner Services Agreement' submitted by the Appellant establishes the legal relationship between the Appellant and the owner of the proposed platform and contains terms indicative of the Appellant's authority to market and provide the solution. In the absence of a more precise requirement or clearer drafting in the tender documentation, the Appellant's submission cannot reasonably be deemed non-compliant.

Accordingly, the Board finds merit in the Appellant's first ground of appeal.

b) ***Second Ground of Appeal: Possibility of Rectification under Note 2***

Without prejudice to the first ground, the Appellant submits that, even if the document submitted was deemed inappropriate or incomplete, the Contracting Authority was under an obligation to request rectification, given that the relevant requirement falls under a Note 2 classification in the Tender Response Format. In this regard, the Appellant argues that the request to provide licence terms fell under the heading "Eligibility/Selection," which is typically subject to Note 2, permitting rectification of incorrect or incomplete documents.

The Board agrees with the Appellant. In accordance with established procurement principles and the applicable procurement policy framework, eligibility and selection requirements denoted under Note 2 are indeed subject to rectification. The Contracting Authority, while having issued rectification requests for other aspects of the Appellant's submission, failed to issue a request specifically addressing the alleged inadequacy of the document submitted in satisfaction of the licence terms requirement. Since no express Note 3 classification was made for this specific requirement within the tender documentation, the Board is of the view that the principle of

legitimate expectation, as well as the rectification mechanism under Note 2, should have applied. The Contracting Authority's failure to invite rectification therefore unduly prejudiced the Appellant.

This Board therefore also upholds the Appellant's second ground of appeal.

c) ***Third Ground of Appeal: Alleged Breach of the Principle of Proportionality***

The Appellant also claims that the decision to disqualify its bid without requesting rectification was disproportionate and inconsistent with Regulation 39 of the Public Procurement Regulations. In response, the Contracting Authority emphasised the principle of self-limitation and the legal impossibility of allowing rectification under a Note 3 requirement.

Given that the Board has determined that the requirement in question did not fall under Note 3 and that rectification was in fact allowable, the issue of proportionality, though relevant in principle, becomes ancillary to the resolution of this case. Consequently, the Board deems it unnecessary to express a definitive opinion on the proportionality argument, as the Appellant's bid should not have been disqualified in the first instance.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Upholds the Appellant's first and second grievances. In light of the findings made, the third ground of appeal is considered superfluous and is not addressed substantively;
- b) To cancel the 'Notice of Award' letter dated 16th May 2025;
- c) To cancel the Letters of Rejection dated 16th May 2025 sent to CY4 Limited;
- d) To order the contracting authority to re-evaluate the bid received from CY4 Limited in the tender, whilst also taking into consideration this Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Dr Ana Thomas
Member